

ROBERT M. DERBY
Claimant

**UNIVERSITY OF KANSAS MEMORIAL
CORPORATION**

AND

Docket Nos. 219,542
& 219,543

- (1) Did claimant suffer accidental injury on the dates alleged?
- (2) Did claimant's accidental injuries arise out of and in the course of his employment with respondent?
- (3) Should claimant be denied benefits in excess of his medical treatment for having failed to prove disablement for a period of

at least one week from earning full wages at the work at which claimant was employed?

- (4) Is respondent entitled to a credit pursuant to K.S.A. 44-501(c) for claimant's preexisting functional impairment?
- (5) What is the nature and extent of claimant's injury?
- (6) How much compensation is due claimant for this injury or injuries?
- (7) Is claimant entitled to future medical treatment?
- (8) Is claimant's injury an aggravation of a preexisting condition, which was not caused, added to or increased in any way?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Award Nunc Pro Tunc of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are accurate and appropriate, and the Appeals Board adopts those findings as its own as if specifically set forth herein as to the issues raised. In doing so, the Appeals Board affirms the Award of the Administrative Law Judge.

In the Award Nunc Pro Tunc, the Administrative Law Judge discussed an apparent conflict created by the Supreme Court in Kinder v. Murray & Sons Construction Co., Inc., 264 Kan. 484, 957 P.2d 488 (1998) and K.S.A. 1996 Supp. 44-501(g). In Kinder, the Kansas Supreme Court stated that "[w]orkers compensation statutes are to be liberally construed to effect the legislative intent and award compensation to a worker where it is reasonably possible to do so." The Administrative Law Judge, after citing this language, opined that the Supreme Court's opinion required him to give deference to the worker. The Administrative Law Judge pointed out that the Supreme Court did not discuss the apparent conflict between its holding in Kinder and the legislative changes to K.S.A. 44-501(g), as modified in 1987. In fact, the Kansas Supreme Court, in Kinder, did not mention K.S.A. 44-501 which, in its July 1987 language, provided:

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act

shall be applied impartially to both employers and employees in cases arising thereunder.

The Supreme Court's Syllabus ¶ 1 in Kinder, which followed the former case law language, does create confusion. The modification of the "liberal construction" case law language by the "applied impartially" statutory language was significant in the Court of Appeals' decision in Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996). In this case, the Administrative Law Judge stated this modification, announced in Kinder, had the arguable effect of reversing Boucher. The Administrative Law Judge went on to state "[w]hile this court will not make its findings based upon that theory, it is obligated to apply the liberal construction rule to the now repealed version of 44-501© (sic) cited above."

The apparent conflict created by the Supreme Court in Kinder has been clarified by the more recent Kansas Supreme Court decision, Nguyen v. IBP, Inc., Docket No. 79,240 (Kan. 1999).

In Nguyen, the Kansas Supreme Court discussed K.S.A. 1996 Supp. 44-501 and the "liberal construction" versus "applied impartially" language of the case law/statute conflict. The Supreme Court, in Nguyen, clarified that the liberal construction rule in the Workers Compensation Act is "no longer supported in law and has not been countenanced by the appellate courts in post-1987 cases."

It is fortunate that the Administrative Law Judge did not base his findings upon the liberal construction rule, as the Supreme Court's language in Nguyen would have necessitated a reversal. However, there is sufficient evidence in this record to find the time limitations of K.S.A. 44-501(c), as interpreted in Boucher, do not apply in this instance.

With the exception of his analysis of the liberal construction rule, the Award Nunc Pro Tunc of Administrative Law Judge Brad E. Avery dated August 28, 1998, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Nunc Pro Tunc of Administrative Law Judge Brad E. Avery dated August 28, 1998, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Topeka, KS
Gary R. Terrill, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director